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Jefferson B. Fordham

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# SOME OBSERVATIONS UPON UNEASY AMERICAN FEDERALISM

JEFFERSON B. FORDHAM†

*Professor Fordham's work first appeared in these pages over fifty years ago, when he served as Editor-in-Chief of the Review. Since that time, he has become a distinguished law professor and dean, a frequent contributor to legal journals, and a prominent member of the American legal community. We are, therefore, extremely proud to again provide a forum for this honored alumnus of our school and our Review. In this Article, Professor Fordham explores an issue that has perplexed our Republic since its beginnings—the relationship between the states and the federal government. The focus is both historical and contemporary in scope, with a provocative analysis of the possible content and ramifications of a federal constitutional convention.*

A half century ago this writer was somewhat preoccupied with a very special aspect of American federalism. The reference is to the doctrine of *Swift v. Tyson*<sup>1</sup> under which the federal courts, sitting in diversity of citizenship cases, held themselves not bound by state court decisions as to state common law or equity involving commercial law or general jurisprudence. What was found to be particularly troubling by him and others was the disposition of some lower federal courts to apply *Swift v. Tyson* to the interpretation of uniform state laws regarded as in large part codifications of the law merchant and other areas of common law.<sup>2</sup> The Supreme Court put a quietus upon that notion in 1934.<sup>3</sup> Three years later, *Swift v. Tyson* was overruled.<sup>4</sup>

The experience just noted gave a modest boost to state autonomy. It left the states with authoritative voice as to their common law as well

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† Distinguished Professor of Law, University of Utah; Dean Emeritus, University of Pennsylvania Law School. A.B. 1926, M.A. 1929, J.D. 1929, LL.D. 1953, University of North Carolina; J.S.D. 1930, Yale University; LL.D. 1960, Franklin & Marshall University; L.H.D. 1970, University of Pennsylvania.

1. 41 U.S. (16 Pet.) 1 (1842).

2. See Fordham, *The Federal Courts and the Construction of Uniform State Laws*, 7 N.C.L. REV. 423 (1929).

3. *Burns Mortgage Co. v. Fried*, 292 U.S. 487 (1934).

4. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

as to the meaning and application of their own legislation. But it certainly did not confine common law in the United States to the state sphere. While there is no federal common law of crimes,<sup>5</sup> there are quite a few patches of federal common law in the civil domain. Notable are the areas of air and water pollution,<sup>6</sup> commercial relationships of the United States,<sup>7</sup> and admiralty.<sup>8</sup>

Federal courts have a creative potential, in the determination of diversity of citizenship cases, as to state common law in areas that the state courts have not addressed. One recalls, for example, the case of *Dailey v. Parker*,<sup>9</sup> in which in the absence of state decisions, the court, in a diversity case, held that a child may have a cause of action for alienation of affections of a parent upon whom the child is dependent. This is not, however, to be identified as a very significant federal role since the state courts and legislatures do have the competence to articulate the authoritative word.<sup>10</sup>

## I. THE INFLUENCE OF SOCIETAL CHANGE

There has been a constitutional revolution in this country that has taken place and is continuing not so much as a matter of deliberate change in the organic law but as the relatively uncontrollable effect of societal change. There is a fluid population enjoying extraordinary freedom of movement. There are profound changes in values and moral outlook and in such basic institutions as the family. A very considerable part of the private wealth in the country is invested in private means of transport and the business units that service them. Economic production and distribution on a national scale sweep freely over jurisdictional lines. Commercial transactions are standardized in a system in which such devices as contracts of adhesion are the handmaidens. In a word, we are served by a national market that strongly promotes standardization and basic sameness on a national footing.

The reach of the power of Congress to regulate interstate com-

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5. *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

6. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (pollution); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (air pollution).

7. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

8. The Supreme Court has recognized a common law cause of action for wrongful death in the realm of admiralty law. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

9. 152 F.2d 174 (7th Cir. 1945).

10. This is self-evident; state law is made by constitutional provisions, legislation and judicial decision.

merce has come to extend largely over a perceived national market, subject to an intergovernmental relations qualification fashioned in the *National League of Cities* case in 1976.<sup>11</sup>

The relatively recent stirring of concern for the nurturing of environmental values and for conservation of natural resources is a significant development in American federalism. Federal authority under the commerce clause is all but pervasive as to both air<sup>12</sup> and water,<sup>13</sup> and federal influence as to the land component is great.<sup>14</sup> Here we are perceiving the conditions of human life in a realistic perspective that inevitably affects political and legal responses.

## II. INTERPRETIVE ROLE OF THE POLITICAL BRANCHES

A point not greatly stressed in law school courses in constitutional law is that the political branches play responsible roles in constitutional interpretation. Certainly interpretation is not exclusively for the judicial branch. As a matter of fact, legislative and executive consideration come first. The executive may press a proposed measure upon the legislative branch and support it with an attorney general's opinion on its constitutionality. Again, the executive may base a veto upon constitutional grounds, as did Andrew Jackson in vetoing a bill to renew the charter of the Second Bank of the United States.<sup>15</sup> Both political branches may join in the adoption of measures responsive to economic and social problems with the ultimate question of constitutionality remaining for judicial determination. The fact of legislative and executive action, therefore, is not to be taken lightly.

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11. *National League of Cities v. Usery*, 426 U.S. 833 (1976). In a five to four decision the Court held that the 1974 amendments to the Fair Labor Standards Act, which extended the minimum wage and maximum hour provisions of the Act to unelected employees of states and their political subdivisions, operated to displace the states' freedom to structure integral operations in areas of traditional government functions such as fire prevention, police protection, sanitation, public health, and parks and recreation, and that insofar as this is true, the amendments are not within the authority granted Congress by U.S. CONST. art. I, § 8, cl. 3. 426 U.S. at 851-52.

12. Federal control over the atmosphere is illustrated by The Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended in scattered sections of 42 U.S.C. (1976 & Supp. I 1977)).

13. It takes little more than a rill to establish navigability as a basis of federal jurisdiction under the power to regulate interstate commerce. *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974) (control over nonnavigable tributaries of navigable streams); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

14. A considerable part of the land in the continental United States is in the national domain. As for the rest, there is, for example, jurisdiction to regulate land uses that involve emissions into the ambient atmosphere, see 42 U.S.C. §§ 7411, 7412 (Supp. I 1977), or have adverse effects upon waters under federal jurisdiction, see 33 U.S.C. § 1311 (1976 & Supp. I 1977), and land transactions of an interstate character, see 15 U.S.C. §§ 1701-1720 (1976).

15. See SENATE LIBRARY, PRESIDENTIAL VETOES, 1789-1976, at 10 (1978).

As to some questions which may be identified as political questions assigned by the organic law to the political branches, the legislative word is final.<sup>16</sup> But so long as a challenger may get into court, there remains the judicial responsibility of determining what, as a matter of interpretation, lies in the political sphere.<sup>17</sup> Thus the role of the courts is both a very responsible and a strategic one. Legislative resort to severability clauses certainly recognizes this.

Legislative acknowledgement of judicial review through inclusion of severability clauses in statutes is a commonplace. The role of severability clauses is, however, fraught with dubiety. In the absence of such an element, it is reasonable to expect of the judiciary that a statute considered to be at odds with the federal or state constitution insofar as a particular provision or application is concerned, be given effect so far as may be. In this view a severability clause is supererogation. It may be said of severability clauses, in any event, that they have been used so freely—even casually—as to leave them in a weak hortatory stance. This may be noted with emphasis as to a general prospective severability provision in a general interpretation act.<sup>18</sup>

One must take note of a current impressive perspective of federalism which has been articulated by Professor Jesse H. Choper. He states his "Federalism Proposal" as follows:

The major thesis of this article, the Federalism Proposal, may be stated briefly: the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; the constitutional issue whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, with final resolution left to the political branches. Neither this Proposal nor the discussion that follows treats the substantive question whether, in any given instance, the national government has overreached its delegated authority; the focus instead will be on which branch of government should decide this constitutional issue.<sup>19</sup>

Were the Choper "gleam" to be shared by the courts the roles of the political branches in constitutional exegesis would be immensely more important. It is to be noted that he is careful to make it plain that

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16. The doctrine goes back to *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). Note the treatment of the subject in the opinion of Justice Brennan in *Baker v. Carr*, 369 U.S. 186 (1962), in which he put the matter in terms of whether there was "textually demonstrable commitment of the issue to a coordinate political department." *Id.* at 217.

17. See *Powell v. McCormack*, 395 U.S. 486 (1969).

18. See, e.g., MINN. STAT. ANN. § 645.20 (West 1945).

19. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977).

his proposal would not exclude judicial cognizance of constitutional questions concerning human rights. It would appear to assign to Congress, however, authoritative determination of a basic concern of this paper—whether there may be a limited federal constitutional convention. We shall get to that issue in due course.

Meanwhile, it must be observed that the major and distinctive factor in the processes of change and adaptation in American constitutionalism has been judicial review of legislative, executive and administrative action within the constitutional framework. The Constitution, as will be further noted, is silent as to formal revision. We have had what amounts to a large measure of revision through judicial exegesis in a changing society, an experience to which reference has already been made. One takes particular note of the commerce power, as it bears upon a highly interrelated national economy serving a very mobile society,<sup>20</sup> and of the post-Civil War amendments as they have been interpreted to serve, in effect, as safeguards of the first ten amendments' human rights against adverse state action.<sup>21</sup> Viewed in world perspective, this is an extraordinary feature of American society. Appointed federal judges and not elected representatives are making many of the key decisions.

This experience, one suggests, has tended strongly to obviate any perceived need for general revision of the Constitution.

### III. IMPORTANCE OF STATE CONSTITUTIONAL LAW

Another aspect of constitutional law to be noted is the slighting of state constitutional law in legal education. Of course, there may be reference to a particular problem but state constitutionalism, broadly perceived, gets short shrift. One notes that an excellent recent volume entitled *American Constitutional Law* accords the state constitutional dispensation no independent consideration whatever.<sup>22</sup> The reader may wonder what an observation like that is doing in this article. The explanation is plainly that state constitutional law is both a substantial component of the constitutional system and something of very real professional significance to lawyers.

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20. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In this case, the Court did not find it necessary to hang interstate freedom of movement upon any particular constitutional provision.

21. See the rationale of Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

22. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

## IV. STATE AND FEDERAL CONSTITUTION-MAKING COMPARED

The unitary character of states as political entities is in marked contrast with the federal nature of the United States. It is understandable, and experience has demonstrated, that policymaking in the constitutional realm is far more facile at the state than the federal level.

A brief review of what has been done by amendment at the federal level is in order. There have been twenty-six amendments to the federal constitution, all of which were initiated by Congress. One of them was by way of repeal of another, which left a net of twenty-four. Of the twenty-four, over half had to do with human rights (taking voting to be such). The first ten were almost contemporaneous with the basic instrument and the post-Civil War amendments gave expression to values confirmed by the outcome of the war. The eleventh, provoked by *Chisholm v. Georgia*,<sup>23</sup> denied federal judicial power to entertain litigation by a citizen of another state or a foreign power against a state. The twelfth related to the electoral college and House action if there were no majority vote in the college. The sixteenth, relative to federal income taxation, was not enabling; it simply removed any question as to congressional power to impose income taxes—whether deemed direct taxes or not—without apportionment among the states on the basis of population.<sup>24</sup> The seventeenth replaced legislative election of Senators with popular election. The nineteenth provided for woman suffrage at state, including local, as well as federal levels. The twentieth fixed the terms of the President and Vice-President as well as those of members of both houses of Congress and authorized Congress to provide for the filling of vacancies. The twenty-first amendment limited a president to two terms. The twenty-third extended to the District of Columbia voice in the election of Presidents and Vice-Presidents. The twenty-fourth banned requirement of payment of poll or other taxes as a condition to voting for President, Vice-President, or a member of Congress. The twenty-fifth amendment regulated Presidential succession and the twenty-sixth established an eighteen-year-old voting age for elections at all levels.

The federal constitution remains a relatively trim organic instrument in contrast with the characteristically explicit and detailed text of many state constitutions.<sup>25</sup> The latter type of organic instrument is

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23. 2 U.S. (2 Dall.) 419 (1793) (standing of a citizen of Georgia to sue the State of Georgia in a federal court upheld).

24. *Brushaber v. Union Pacific R.R.*, 240 U.S. 1 (1916).

25. A copy does not pad one's pocket.

more ephemeral since it contains much in the way of provisions of a secondary policy level not essential to a fundamental charter of government. The book-length Constitution of Louisiana, after going through a recent revision process,<sup>26</sup> remains as a document more than one hundred pages in length. The California instrument is longer.<sup>27</sup>

Amendment and general revision of state constitutions are commonplace. The accretion of provisions that might fairly be described as legislative level in character bespeaks periodic revision. The trick, for example, of getting a legislative policy, such as a commitment of highway use and gasoline taxes to highway purposes as distinguished from flow into the general fund, embedded in a state constitution is a familiar denigration of representative government.<sup>28</sup>

## V. FISCAL DEPENDENCIES

The United States is fairly to be perceived as a political entity that draws into its coffers a large fraction of the total national income, some of which it spends directly for governmental operations and social services, and a very substantial fraction of which (some \$80 billion) it shares with state and local governments. Over time this brings about a condition of dependence or one might say, euphemistically, of lopsided interdependence.

The outer limits of the conditions that the United States may attach to federal grants or lending of credit to state and local governments have not been defined. Arguably there is no pressing need for lines to be drawn in order to preserve genuine federalism since governmental recipients under this or that program voluntarily accept Washington's conditions. But a taxpayer has been found to have standing to challenge federal aid to be used by local government in a way inconsistent with such express constitutional limitations as the establishment clause of the first amendment.<sup>29</sup> It remains to be seen whether the courts will find unacceptable conditions that, as a practical matter, control state or local choice on political powers or governmental jurisdiction or structure.

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26. The Louisiana Constitution was revised, effective midnight December 31, 1974, pursuant to action of a constitutional convention. 1 LA. CONST. 153 (West 1977) (annotated version).

27. The California Constitution of 1879, as amended to July 1, 1954, occupied some 176 pages. 3 CAL. CONST. 520 (West 1954).

28. For a relatively liberal example, see UTAH CONST. art. XIII, § 13.

29. *Flast v. Cohen*, 392 U.S. 83 (1968).



General federal revenue-sharing, a policy adopted in 1972,<sup>30</sup> invites special comment. Use of the funds is not confined to any particular purpose or function. But the statute does require that a recipient unit not engage in discrimination based on race, color, sex or national origin in any of its activities or programs.<sup>31</sup>

This policy presents some interesting questions. Congress has used taxation as a leveler to influence state policy on social legislation.<sup>32</sup> And, of course, it can condition the use of shared federal revenues. General revenue-sharing could be used to influence state and local governments to coordinate their tax systems with those of the national government. Already federal law provides for federal collection of state income taxes pursuant to formal agreement.<sup>33</sup> Conceivably more studied coordination could achieve greater tax equity consistently with reasonably serving the needs of the several levels of government.

There is the approach of federal payments to local governments in lieu of taxes. Congress has adopted this policy on payments to local units in which lie federal lands not subject to state or local ad valorem taxes.<sup>34</sup> This is significant aid to units within the purview of the program, but it is not a major factor in overall revenue policy.

## VI. THE PROCESS OF CONSTITUTIONAL CHANGE

While the concern here is with the convention method, the reader is reminded both that initiation of action has been done exclusively by Congress up to this point and has been done without any limitation upon initiating competence.

We have had no experience with a federal constitutional convention since 1787. There have been some expressions of state interest over the years,<sup>35</sup> and serious movements in that direction in recent years. During the 1960s, state legislative applications for a convention concerned with qualifying the force of the Supreme Court's one-per-

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30. State and Local Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (codified at 31 U.S.C. §§ 1221-1265 (1976)).

31. 31 U.S.C. § 1242 (1976).

32. A particularly notable example was the imposition of a federal tax upon employers of eight or more to bring about unemployment compensation on a national scale. The carrot was a ninety per centum credit for participating employers. *See* *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937).

33. 26 U.S.C. §§ 6361-6365 (1976).

34. 31 U.S.C. §§ 1601-1607 (1976).

35. *See generally* STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION (Comm. Print 1961).

son-one-vote decisions affecting state and local representative bodies fell one state short of the requisite two-thirds.<sup>36</sup> Further reference will be made to this in terms of substance. Here one invites attention to process.

Both ratification of a proposed amendment originating in Congress and application by states to Congress for the call of a convention are made expressly a function of state "legislatures" by article V. This covers the ground affirmatively to the exclusion of gubernatorial or voter participation (the latter by referendum).<sup>37</sup>

There is no question but that Congress may set a time limit for state ratification of an amendment initiated by Congress.<sup>38</sup> Whether a legislature could rescind its application for a convention before the requisite applications by two-thirds of the legislatures is an open question. A very recent, thorough study reached the conclusion that neither extension of the ratification period nor recognition of state rescission was at odds with the basic values of article V.<sup>39</sup> The disposition of its writer was to leave decision with the Congress under the political questions rubric. Of course, it is a matter of public knowledge that Congress has taken a position by extending the period for ratification of the Equal Rights Amendment. Chief Justice Hughes, in writing the opinion of the Court in *Coleman v. Miller*,<sup>40</sup> did confirm support for the conception, previously embraced in *Dillon v. Glass*,<sup>41</sup> of a reasonable time period grounded in the consideration that there should be sufficient contemporaneousness to reflect the will of the people over the nation generally at relatively the same period. Although this reasoning would have reduced force with respect to a time limit set by Congress upon state applications for an open convention since that body would not be confined to particular areas of concern, *Coleman* lends support for the political questions disposition.

## VII. FEDERAL CONVENTION SCOPE—OPEN OR LIMITED?

There is no limitation upon the initiating competence of Congress.

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36. See generally *Symposium on the Article V Convention Process*, 66 MICH. L. REV. 837 (1968); Bonfield, *The Dirksen Amendment and the Article V Convention Process*, *id.* at 949.

37. *Hawke v. Smith*, 253 U.S. 221 (1920). The decision related to the referendum situation, but the reasoning applies equally to the gubernatorial approach.

38. *Dillon v. Glass*, 256 U.S. 368 (1921).

39. Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PENN. L. REV. 494 (1978).

40. 307 U.S. 433, 452 (1939).

41. 256 U.S. 368 (1921).

What basis is there for differentiating between Congress and a convention in this regard? A negative answer is consistent with the policy of enabling the states to provoke action as to consideration of constitutional change. It is entirely consistent to recognize that particular state concerns might provoke the call of a convention and to perceive a convention, once called, to be competent to consider matters other than those that led to the call. In any event, even if the call were limited, the convention might overrun the limits, as did the Convention of 1787, which was called to propose revision of the Articles of Confederation.<sup>42</sup>

The state cases largely support the view that a state constitutional convention is not subject to procedural limitations.<sup>43</sup> As for substance, one notes at once that there is impressive authority for the view that, at the state level, limited constitutional conventions may be held without express constitutional provision for them.<sup>44</sup> There is a distinction between a call of a limited convention by a state legislature and such a call approved by the electorate. As to the latter, it can be said that the voice of the sovereign has imposed the limitation.<sup>45</sup>

Is the state experience of weighty import with respect to the substantive limitations that might be imposed on a federal constitutional convention? The electoral factor just mentioned would not be operative since it is not involved in the federal process. Article V bespeaks *legislative* application to Congress for the call of a convention. The

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42. On February 21, 1787, the unicameral Congress, existing under the Articles of Confederation, adopted a Resolve as follows:

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states, be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states, render the federal constitution adequate to the exigencies of Government and the preservation of the Union.

*Report of Proceedings in Congress, Wednesday, February 21, 1787*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 44, 46 (C. Tansill ed. 1927).

Of course, it may be contended that the 1787 action is to be explained as the work of a revolutionary body. To do this would be to say that the revolutionary condition and aura extended well beyond independence and several years of experience as a confederation. The Constitution was adopted by sovereign states that had been so for a number of years.

43. *E.g.*, Pryor v. Lowe, 258 Ark. 188, 192, 523 S.W.2d 199, 202 (1975); Carlton v. Secretary of State, 151 Mich. 337, 340, 115 N.W. 429, 430 (1908); see Levine, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. LEGIS. 127, 133 (1973).

44. See Levine, *supra* note 43, at 131-42. The 1967-1968 Pennsylvania convention is a recent example. The state constitution is silent as to constitutional conventions, but initiation of amendments by limited convention was upheld. *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969), *cert. denied*, 395 U.S. 827 (1969).

45. See R. HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 120-21 (1917).

provision is thought to have stemmed from concern that as components in a federal system the states should be in a position to set in motion machinery for possible changes in the federal organic charter considered to be to their interests as units in the federation.<sup>46</sup> There was no focus upon subject matter range.

The records of the 1787 Convention do not throw much direct light upon the scope of the convention method of initiating amendments. The debates in the Convention, as edited by Jonathan Elliott, disclose that at one stage the draft document called for action by Congress in proposing amendments either on its own motion or upon application of two-thirds of the legislatures of the states. Later the draft was amended to require a convention on application of the legislatures of two-thirds of the states.<sup>47</sup> That resulted in the ultimate text of article V.

An argument can be made, as a matter of constitutional history, that article V stands in contrast with the call of the 1787 Constitutional Convention. The latter related expressly to "revision" of the Articles of Confederation. The former speaks simply of a convention called for "proposing amendments." Perhaps article V is not directed to thorough revision, but it surely places no express limitation upon the number or nature of amendments that a convention might propose.

In 1974, a Special Constitutional Convention Study Committee of the American Bar Association submitted a report in which appeared the following paragraph:

The text of Article V demonstrates that a substantial national consensus must be present in order to adopt a constitutional amendment. The necessity for a consensus is underscored by the requirement of a two-thirds vote in each House of Congress or applications for a convention from two-thirds of the state legislatures to initiate an amendment, and by the requirement of ratification by three-fourths of the states. From the language of Article V we are led to the conclusion that there must be a consensus among the state legislatures as to the subject matter of a convention before Congress is required to call one. To read Article V as requiring such agreement helps assure "that an alteration of the Constitution proposed today has relation to the sentiment and felt needs of today . . . ."<sup>48</sup>

46. ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION 11-12 (1974).

47. 2 J. ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 251 (2d ed. 1836).

48. ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V, at 11 (1974) (quoting J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS AND MODES OF PROCEEDING § 585, at 634 (4th ed. 1887)).

This seems to say that there could not be a general convention since the constitutional scheme bespeaks a consensus among the state legislatures as to subject matter before Congress is required to call a convention! But the report goes on to say expressly that general conventions are not precluded.<sup>49</sup>

It is to be noted that the American experience has not embraced the conception of a constitutional convention as a constituent assembly, that is, a representative body with competence both to draft *and to adopt* a charter of government or constitution, if you will. At the state level, except for Delaware,<sup>50</sup> the pattern is ratification by the voters. At the federal level, as is well known, of course, state ratification is by representatives, whether in a legislature or a constitutional convention as determined by Congress under article V. The federal constitution was ratified by state conventions as specified by the federal convention of 1787 in article VII of the document.

In a number of states the initiative is available for constitutional changes as well as for legislation.<sup>51</sup> Of course, the current wave of populism<sup>52</sup> could move things in a positive legislative sense through resort to the initiative at state and local levels. Some may desire it for the national government, but one does not perceive it to be an innovation at all likely to be adopted by federal constitutional amendment. A national referendum upon this or that proposed legislative measure of any complexity would be about as vacuous an exercise as one could imagine.

It is in order to take particular note that even the legislatures are joining in the expressions of distrust of representative government. This is well-nigh the ultimate irony in an increasingly populous and complex society.

As we pursue the matter of substantive reach of federal constitutional convention jurisdiction, it is in order to note afresh that, in historical perspective as well as theoretical perceptions of the nature of a constitutional convention, such a body is deliberative in character. Plainly Congress is a representative deliberative body that is not sub-

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49. *Id.* at 18.

50. In Delaware, amendment is by the legislature in a process involving opportunity for public reaction between legislative sessions and before final action. DEL. CONST. art. XVI, § 1.

51. California provides an example of the direct initiative process, which bypasses the legislature. CAL. CONST. art. 18, § 3. Massachusetts, in contrast, has the indirect initiative, which involves opportunity for legislative consideration and modification. MASS. CONST. §§ 159-161.

52. The overriding concern is with reducing the financial burdens imposed by government, but the populist spirit reaches beyond this.

ject to any identifiable substantive limitations in performing its function of initiating constitutional amendments. What basis is there for saying that a convention would be any less so? Article V speaks in the plural of a convention for proposing amendments. If either the applying states or the Congress may limit the subject matter reach of a convention, where do we draw the line? At the restrictive extreme was a proposal of the 1960s, previously noted, calling for convention action upon a proposed amendment concerning representation in state and local bodies that left to convention determination only the issue of taking or leaving the proposed amendment *in haec verba* as submitted by the state legislatures. Surely that treated a convention as a political eunuch not worthy of its name. If convention scope may be narrowed at all, would it not be the Congress with authority to do so?

So far as there might be a risk that convention action of a "far-out" character would become reality, the states could say a negative last word at the ratification stage.

While the Constitution does not exact that Congress lay down ground rules in advance to govern the states in initiating the convention-calling process, there have been three recent, but abortive, moves in this direction.<sup>53</sup> It is noteworthy that the three bills dealt both with state initiatory action and congressional response in calling a convention. Obviously Congress is free to take no action until sufficient state applications are made. Were prospective regulation by Congress pursued, it could hardly be said to control willy-nilly since congressional power to respond to an application for a convention would continue undiminished.<sup>54</sup>

Senate Bill 215, introduced by Senator Ervin of North Carolina in the First Session of the Ninety-Second Congress, went far beyond the basics of providing for representation in a convention, funding and the requisite supportive elements such as physical facilities, staff and other needs of a deliberative body.<sup>55</sup> It also undertook to regulate internal organization and procedure as well as scope of substantive jurisdiction. Surely it is implicit that a deliberative body concerned with the organic law of a society have control of its organization and procedure.<sup>56</sup> No doubt Congress could provide for temporary organization to enable a

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53. S. 215, 92d Cong., 1st Sess. (1972); S. 623, 91st Cong., 1st Sess. (1969); S. 2307, 90th Cong., 2d Sess. (1968).

54. See Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191-92 (1972).

55. S. 215, 92d Cong., 1st Sess. (1972).

56. The state cases support this position. See Levine, *supra* note 43.

convention to organize itself for the conduct of its business. Senate Bill 215, however, went so far as to require that convention delegates take an oath not to vote for any matter beyond the substantive scope of the convention as a limited body. This is rather demeaning even if valid, which is not granted. More substantial was a provision for final determination of whether there were in effect sufficient valid applications "with respect to the same subject" by a concurrent resolution of the two houses of Congress, which would also set forth "the nature of the amendments" that the convention is called to consider. This would reject the open convention interpretation and thereby pose a serious constitutional question.

As to presidential participation, it is noted that all the bill called for was a simple majority vote, whereas a two-thirds vote is required to override a veto as well as for Congress to initiate a constitutional amendment. That offsets a veto power, which a simple majority vote obviously does not do.<sup>57</sup>

There has been a very significant change in the make-up of basic legislative institutions. The reference, of course, is to representation governed by the one-person-one-vote principle which, as to the lower house of Congress, is derived from section 2 of article I of the Constitution<sup>58</sup> and, as to state legislatures and local governing bodies, is drawn from the equal protection clause of the fourteenth amendment.<sup>59</sup> The test at the federal level is very demanding: very little departure from population equality will pass judicial muster.<sup>60</sup> Fairly substantial deviation from population equality in state and local representation may be justified.<sup>61</sup>

Since the 1970 census, followed by congressional reapportionment of congressional house seats among the states, there has been state redistricting effectuating apportionment in all states. At the state level, Mississippi has recently concluded thirteen years of litigation over reapportionment of state legislative representation. In May of 1977, the Supreme Court rejected for malapportionment a court-ordered plan and sent the case back to the district court to devise a plan that would

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57. See Committee on Federal Legislation, *Proposed Procedures for Federal Constitutional Conventions* (S. 215), 27 REC. B. CITY N.Y. 333 (1972).

58. The section provides for representatives "chosen every second Year by the People of the several States." This is interpreted to call for one-person-one-vote. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

59. *Reynolds v. Sims*, 377 U.S. 533 (1964).

60. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-32 (1969).

61. *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973).

meet constitutional requirements.<sup>62</sup> The plan called for maximum population deviations of 16.5% in senate districts and 19.3% in house districts.<sup>63</sup> Meanwhile, in August 1978, Mississippi sought federal court approval of a statutory plan under the Voting Rights Act.<sup>64</sup> The Attorney General objected on the ground that the plan would dilute black voting strength. Parties in the original case had agreed on a court-ordered plan and got it introduced in the Voting Rights Act case to show it was more protective of black voting rights. This was after the plaintiffs in the original case had applied to the Supreme Court for a writ of mandamus ordering the district court to carry out the May 1977 order of the High Court. On May 21, 1979, the Supreme Court denied the petition for writ of mandamus on a showing that the district court had entered a final judgment ordaining a court-defined plan and elections to be conducted in the coming summer on the understanding that there would be no appeal.<sup>65</sup> If nothing else, this Mississippi experience tells us that it takes much more than constitutional adjudication to give living meaning to fundamental values in a political system.

What has been the significance of this legal revolution in terms of the quality and performance of legislative bodies? Certainly it can be said at once that confidence in representative government has not been strengthened. California's Proposition 13 and its reverberation around the land plainly tell us this. More particularly, what has been the effect in terms of distribution of seats among political parties, as between rural and urban areas and as between suburbs and inner-city areas? What differences in state policy formulation has the process brought about?<sup>66</sup> Are legislatures that are no longer malapportioned more sensitive to social problems? To urban problems broadly? To safeguarding of human rights? Are they more conservative by force of greater representation for the relatively affluent people in suburban areas?

In making provision for a constitutional convention, would Congress be governed by the one-person-one-vote principle? The Constitution does not speak to the question. Although the bases for application of the principle to the lower house of Congress and to state and local

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62. *Connor v. Finch*, 431 U.S. 407 (1977).

63. *Id.* at 416-17.

64. This action was noted in *Conner v. Coleman*, 99 S. Ct. 1523 (1979). If upheld, the statutory plan would govern, as the Court here noted.

65. *Conner v. Coleman*, 99 S. Ct. 2400 (1979).

66. Political scientists have addressed this question. See, e.g., Uslander, *Comparative State Policy Formation, Interparty Competition, and Malapportionment: A New Look at V.O. Key's Hypothesis*, 40 J. POLITICS 409, 422-30 (1978).



representative bodies are to be found in the provisions of the Constitution, that is not true of a convention. One would have to reach beyond the Constitution to some sort of transcendent principle to apply one-person-one-vote to a constitutional convention.

### VIII. CONSTITUTIONAL CONVENTION GRIST

Let us suppose that a constitutional convention were called and that the correct view were that such a body is unrestricted as to what it could propose. This invites speculation as to what the convention might initiate as perceived positive changes.

#### A. *The Legislative Branch*

In keeping with the spirit of the eighteen-year-old voting age, might the minimum ages for election to the Senate and House of Representatives well be lowered? The perception that more senior people in the Senate would serve as brakes upon more impulsive and radical House members has not been validated by experience. There is support for the view that the Senate has been, on the whole, a more social-conscious body and certainly no less sensitive to issues of human rights. Perhaps the security of six-year senatorial terms has a bearing here.

Is the two-year term pattern for House memberships too short? Does this system tend to compromise independence through the demands of the reelection campaigns?

The speech or debate clause has been very liberally interpreted within the bounds of what may constitute legislative action.<sup>67</sup> The protection reaches far beyond what is said in a legislative chamber.<sup>68</sup> One has heard no clamor for change. A possible modification would be to apply qualified privilege, which means that the protection would not cover conduct characterized by malice.

It might be noted here that without benefit of express constitutional provision the Supreme Court has upheld absolute privilege for third-level administrative personnel.<sup>69</sup> This is something that could as readily be changed by a decision according only qualified privilege.<sup>70</sup>

There are problems of separation of powers. In a number of states

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67. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

68. The protection covers aides of members for actions that would be immune if done by members. *Gravel v. United States*, 408 U.S. 606 (1972).

69. *Barr v. Matteo*, 360 U.S. 564 (1959).

70. This position is the one Chief Justice Warren thought should have been taken in *Barr v. Matteo*. *Id.* at 583-84 (dissenting opinion).

the executive power of veto includes the power to veto items in appropriation measures.<sup>71</sup> In some, the governor may reduce items.<sup>72</sup> This makes particular sense as to lump sum appropriations. At the federal level, there is no item veto. Mr. Nixon sought to achieve somewhat the effect of an item veto by so-called impoundment—nonspending—of appropriated funds. The congressional response was enactment of a measure affording Congress the last word.<sup>73</sup> Of course, the item veto could be established by constitutional amendment.

The President has a pocket veto, that is, he can pocket a bill and let it die if Congress adjourns before the ten-day period for Presidential action runs out.<sup>74</sup> He can sign a bill after adjournment *sine die* as long as he acts within the ten-day period.<sup>75</sup>

What is "adjournment" for pocket veto purposes? Certainly under the decisions adjournment at the end of a session or of a Congress is such. And the High Court has held that a formal veto by return of a bill with a veto message to a designated officer of the house of origin during a recess for not over three days is effective.<sup>76</sup> In 1974, Senator Edward Kennedy won a significant test case in which he was recognized as having standing to sue to protect his vote on a bill which had been approved almost unanimously in both houses. There was a five-day adjournment of the Senate, the house of origin, which ran out three days after the ten-day period for Presidential action. Although the Secretary of the Senate was designated as the officer to receive return of a bill during the recess, the President simply "pocketed" the bill. Nevertheless, the bill was held to have been enacted in the absence of an effective veto.<sup>77</sup>

There is something to be said for extending the period allotted the President for action upon a bill. The President, it is true, is likely to know at the time an important measure is passed whether it merits executive approval, but that is not necessarily the case. Certainly the demands of the office are almost overwhelming. One approach would be to afford more time and eliminate the pocket veto entirely.

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71. *E.g.*, UTAH CONST. art. VI, § 8. North Carolina stands alone as a state that does not accord the governor the power of veto.

72. *E.g.*, ILL. CONST. art. 4, § 9.

73. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-334, 88 Stat. 297 (codified as amended at 31 U.S.C.A. §§ 1301-1407 (West 1976 & Cum. Supp. 1979)).

74. *The Pocket Veto Case*, 279 U.S. 655 (1929).

75. *Edwards v. United States*, 286 U.S. 482 (1932).

76. *Wright v. United States*, 302 U.S. 583 (1938).

77. *Kennedy v. Sampson*, 364 F. Supp. 1075 (D.D.C. 1973), *aff'd*, 511 F.2d 430 (D.C. Cir. 1974). See also *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976).

A major separation of powers problem area that has become increasingly active is presented by Congressional resort to veto in reverse. The subject has been examined recently in an excellent article by Professor Robert Dixon, which appeared in the pages of this review.<sup>78</sup> It has, moreover, gotten thoughtful consideration in other journals.<sup>79</sup> Were there to be an open constitutional convention, the subject would be very likely grist for that mill.

"Lay-over" provisions are readily distinguishable from veto in reverse. They delay effectiveness of executive or administrative action to afford Congress time to act on the subject through normal legislative processes.<sup>80</sup>

This writer is emboldened to articulate a very simplistic view of the subject. The suggestion is that Congress may take action that has the force of law only through the legislative process pursued in both houses. Certainly as to a measure originating within the Congress, action by one house does not make law. At the same time, it must be said that it is just as much the internal legislative process to reject a "measure" as to approve or adopt one.

Let us take the determination of federal salaries as an example of veto in reverse. That federal salaries are appropriate subjects for legislative action is clear enough: section 6 of article I of the Constitution provides expressly that the compensation of members of Congress shall be "ascertained by law." Does this leave Congress free to act on the subject in a manner other than the traditional process of enactment?

By an act of 1967, Congress made provision for a nine-member commission of which three, including the chairman, were to be appointed by the President, two of whom would be designated by the Chief Justice of the United States, two appointed by the Speaker of the House of Representatives, and two named by the President of the Senate.<sup>81</sup> Under the act, the commission makes recommendations to the President as to rates of pay for high-level offices and positions in all

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78. Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash*, 56 N.C.L. REV. 423 (1977). Professor Dixon cites other commentaries in *id.* at 425 n.11.

79. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977). Senator Javits may be identified as an ardent advocate of veto in reverse.

80. See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (upholding congressional authority to delegate power to regulate federal courts and the reservation by Congress of the power to examine proposed Federal Rules of Civil Procedure before they become effective).

81. Act of Dec. 16, 1967, Pub. L. No. 90-206, § 225, 81 Stat. 642 (codified as amended at 2 U.S.C. §§ 351-361 (1976)).

three branches, and the President makes his recommendations, with the benefit of the commission report, to Congress. Presidential recommendations, under the 1967 provision, became effective unless Congress legislated differently or either house disapproved of all or part of such recommendations. The Court of Claims upheld this veto in reverse in a case in which the Supreme Court denied certiorari.<sup>82</sup> In 1977, the act was amended to require that both houses approve the salary recommendations by majority vote for them to become effective.<sup>83</sup>

Veto in reverse with respect to administrative rulemaking is another aspect of separation of powers that is very troubling. In the extrapolation of policy under regulatory statutes there is a strongly confirmed practice of delegating rather broad rulemaking authority to agencies or officers in the executive branch or to "independent agencies" that tend to straddle the line between the legislative and executive branches. The theory supporting delegation to both types of agencies is basically the same—governing policy is set by law and administrative rulemaking and application are means of effectuating legislative policy. Even though much that is to be found in administrative regulations clearly could be enacted in the first instance by Congress, single house veto of administrative regulations is quite another thing. If it is to be justified as legislative action, then we have congressional action intended to be of legal force without submission to the executive for approval or veto.

An important legislative responsibility short of veto in reverse is legislative oversight. This, of course, is a recognized function of standing committees. The objects are to keep departments and agencies charged with the administration and enforcement of legislation in the *qui vive* and to gain information relevant to legislative policymaking.

Both the charging and adjudicating functions of impeachment reside, as we all know, in the legislative branch. The process does not

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82. *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 98 S. Ct. 718 (1978). Here the writer presumes to add a personal note. He was appointed to the first panel of the commission but declined to serve not on the basis of an objection to veto in reverse, but because he would not take a then generally required test oath. Since then the oath requirement has been held unconstitutional under the first amendment. *Stewart v. Washington*, 301 F. Supp. 610 (D.D.C. 1969).

83. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § 401(a), 91 Stat. 39 (codified at 2 U.S.C. § 359 (Supp. I 1977)). Obviously this is calculated to neutralize the contention that Presidential veto power is, in effect, denied. It embraces Presidential approval in advance. But it affords no Presidential review of inaction or negative action by the two houses.

apply to members of Congress.<sup>84</sup> Rather, each house is given the power to discipline or expel its own members.<sup>85</sup> A much-mooted question is whether a Senate judgment of impeachment is subject to judicial review. Jurisdiction to try is vested in the Senate, and there is no express provision for review.<sup>86</sup> Whether there might be collateral attack is a more open question. The challenge might rest upon a contention that the proceeding resulted in a conviction upon a ground not specified in the Constitution. In any event, a constitutional convention could propose changes in relation to both grounds and review.

### *B. The Executive Branch*

There is now before the Ninety-Fifth Congress a joint resolution proposing a constitutional amendment designed to replace the electoral college system with direct popular election of the President and Vice-President. The proposal is democratic in thrust but there is opposition based upon concern for federalism. The concern, simplistically put, centers upon the removal of the states—the less populous ones in particular—as important factors in the presidential election process. Proponents focus attack upon the so-called unit rule that assigns all of the electoral votes in a state to the winner in the statewide popular vote. The policy-tension is severe. While the states are represented as such in both houses of the Congress, the unit rule arguably has no place in Presidential elections because the President represents all of us.

Should the President be confined to a single term of four or six years? Obviously a President's actions are likely to be influenced by concern over reelection. On the other hand, six years may be seen as a long term for a President who does not turn out well.

The appointing power of the President has been qualified by usage that is quite removed from the constitutional text. This has been conspicuously the case with respect to appointments of judges and United States Attorneys. Here we confront an old and strongly entrenched practice, known as senatorial courtesy, which gives senators influential voice in appointments to federal office, primarily in their states. The Constitution merely calls for participation by the Senate as a body. President Carter has undertaken to temper political influence in these

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84. The congressional precedent set in the case of Senator Blount of Tennessee in the 1790s still holds. See R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 214 (1973).

85. U.S. CONST. art. I, § 5.

86. See Fordham, Book Review, 47 S. CALIF. L. REV. 673, 680 (1974) (R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973)).

matters by creating panels or commissions charged with receiving, considering and rating applications for federal judgeships as an aid to Presidential nominating action. This may lessen political influence but the problem is not very tractable, given human nature and the political factor. The subject might well engage the attention of a constitutional convention.

Should the constitutional grant of the pardoning power of the President be reexamined? President Ford granted Mr. Nixon a blanket pardon for all offenses against the United States that he may have committed while President, without regard to whether there had been prosecution or conviction. This was not ordinary clemency, and there is the danger that such action might be extended to lesser officers as well. The question of the reach of the pardoning power is acute in a case such as that of Mr. Nixon. Should a President, the chief law enforcement officer of the United States, be able to avoid both impeachment and prosecution by resigning and obtaining white-washing by a successor of his own designation, as the Vice-President normally is?

An area of extreme difficulty and current debate is the distribution of authority and responsibility with respect to foreign relations. Were there an open constitutional convention, should an effort be made to deal with the subject by constitutional amendment?

A treaty entered into under the authority of the United States is the supreme law of the land. The pertinent constitutional provision was given effect by the Supreme Court as early as 1797 in a case in which it was held that a treaty overrode a Virginia confiscation law.<sup>87</sup> During the 1950s, there was a movement to achieve a constitutional amendment, which was articulated in a resolution popularly identified with the name of Senator John Bricker of Ohio, that would allow a treaty effect as internal law in the United States only through legislation that would be valid in the absence of treaty. After debate, a substitute motion failed by one vote. A chief proponent was the American Bar Association. That organization was opposed by a national citizens' committee in which lawyers played leading roles. It is a matter for speculation whether the Bricker effort would be revived were there a constitutional convention.<sup>88</sup>

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87. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1797).

88. One notes with anecdotal interest that the famous migratory bird decision in *Missouri v. Holland*, 252 U.S. 416 (1920), which upheld regulatory legislation implementing a migratory bird treaty with Canada, was decided in the year John Bricker graduated from law school. Of course, Congress may exercise authority under the necessary and proper clause to implement a treaty by statute as it did in the instance of the migratory bird treaty.

Of immediate current interest are questions concerning the extent of the power of the President to attach conditions to the recognition of foreign states or governments. It is well accepted that recognition is a Presidential power, although not expressly mentioned in the Constitution. Recognition expressed in an executive agreement may embrace terms that prevail over state law concerning the disposition of interests of foreign nationals in this country.<sup>89</sup> An agreement as to imports, however, has been held not to prevail under a federal statute based on the commerce power.<sup>90</sup> What is to be said of commitments for defense or otherwise affecting a foreign political entity? If the matter is governed by a treaty that does not grant the President powers of termination or modification, does the President, nevertheless, have competence to act by force of his position as the nation's representative in foreign affairs?

The Vietnam War was an undeclared, large-scale conflict, the legality of which is still a matter of debate. No case presenting the question was decided by the Supreme Court. The power to declare war is plainly vested in the Congress. It is equally clear that the President as Commander-in-Chief of the armed forces may respond to attack without awaiting congressional action. In the War Powers Resolution, adopted by Congress in 1973, over the veto of the President, the reach of executive authority was declared to be as follows:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.<sup>91</sup>

It may well be said that the constitutional scheme now rests and should continue to rest ultimate responsibility and authority in the representatives of the people.<sup>92</sup>

### *C. The Judicial Branch*

Should the constitutional dispensation of the jurisdiction of the federal courts be reexamined? No doubt the most serious concern here has to do with the posture of the Supreme Court. Is the present system

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89. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

90. *United States v. Guy W. Capps Inc.*, 204 F.2d 655, 658 (4th Cir. 1953).

91. War Powers Resolution, § 2(c), 50 U.S.C. § 1541(c) (1976).

92. This is in substantial part a matter of control of the purse.

such that the Court is overburdened? Even if the answer is in the affirmative, is the problem one that cannot be dealt with effectively short of constitutional change? As is well known, these questions have been the subject of a good deal of study and discussion. About all one ventures to say here is that were there an open constitutional convention, no proposed amendment that would deny access to the High Court in a way that would not leave the Court free to exercise the full scope of jurisdiction now vested in it should be embraced. In this the writer is taking the view of the late Chief Justice Earl Warren. The historic commitment in the American political system to judicial review demands no less.

One way to attempt to counter decisions of the Supreme Court that stir criticism is for Congress to exercise its authority to make exceptions to the appellate jurisdiction of the Court. In matters over which the Supreme Court does not have original jurisdiction, the Court is granted appellate jurisdiction "with such exceptions and under such regulations as the Congress shall make."<sup>93</sup> During the 1950s, concern about national security led to the introduction of a measure to exclude from the Court's appellate jurisdiction matters involving national security, which had been the subject of decisions of the Court that were displeasing to the proponents of the measure. Senate Bill 2646 of the Eighty-Fifth Congress, First Session, failed of enactment.<sup>94</sup> Speaking in opposition before a Senate subcommittee, the writer had this to say:

I suggest . . . that members of the legal profession, above all others, should be sensitive to the need of preserving the integrity of the judicial process at all levels, particularly the highest. Free criticism of the decisions of our courts is a thoroughly wholesome and desirable thing. This, however, is a far cry from seeking to reduce the jurisdiction of the Court in order to see to it that it cannot do again what some people might regard as highly erroneous or ill-advised. To proceed in this latter manner is, in substance, to impugn the integrity of the judicial process. I find this insupportable. It is obvious that the cases which ultimately come to decision on the merits in the Supreme Court of the United States are likely to involve very controversial issues, not subject to decision with mathematical certainty. Thus, no matter where the Court comes out, there is likely to be a substantial body of adverse opinion with respect to a decision in a case of great moment. I do not need to labor the distinction between the studious and restrained consideration of the proper distribution of judicial business and the subjecting of the court to politi-

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93. U.S. CONST. art. III, § 2.

94. S. 2646, 85th Cong., 1st Sess. (1957).



cal pressures based on disagreement with their decisions.<sup>95</sup>

It is self-defeating for the people in a free society to withdraw the jurisdiction of an arm of government because some members take a critical view of particular actions involving the exercise of that jurisdiction.<sup>96</sup>

#### D. Human Rights

Is there ground for apprehension that an open constitutional convention would initiate action eroding the constitutional safeguards of human rights as those safeguards have been authoritatively interpreted by the Supreme Court? It should be noted at once that there is no assumption that this is a concern simply on the part of liberals as distinguished from conservatives. In the larger perspective, it is the concern of all.

Doubtless the largest issue that might be raised in convention would be whether to reject or modify expressly the judicial incorporation of most of the Bill of Rights safeguards into the fourteenth amendment under the theory that the due process clause of that amendment assures, as against state action, fundamental rights described by Cardozo as those human rights that are basic to ordered liberty.<sup>97</sup> The rejection might be made on a wholesale basis or eclectically. National as opposed to local values would be involved.

A likely area of reexamination is the separation of church and state required by the establishment clause of the first amendment. There is much interest in obtaining government financial support, in one form or another, for religiously affiliated schools. The historic perception has been that in the long view the separation principle is in the best interest of religion since it protects religious associations and institutions against political action. It is noted, at the same time, that problems of regulation and taxation of religious organizations continue to confront American society. There is no question but that some organizations operating under the banner of religion can and do engage in

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95. *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearings on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. 273 (1958) (statement of Jefferson B. Fordham).

96. A current move by Senator Helms of North Carolina again poses a threat to the "integrity of the judicial process." See S. 450, 96th Cong., 1st Sess. § 11, 125 CONG. REC. S. 4157 (daily ed. Apr. 9, 1979).

97. *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

To be noted here also is the High Court's enunciation of the policy that federal courts in the District of Columbia have competence to invalidate action that, if taken by a state, would deny equal protection of the laws. *Hurd v. Hodge*, 334 U.S. 24 (1948).

practices involving financial and other exploitation of individuals quite at odds with conventional moral standards.

Tax exemption of property of religious organizations is plainly a form of subsidy and may be questioned since it involves the donation of public services. One justification is that religious organizations do good works and promote the pursuit of values cherished by organized society.<sup>98</sup> Is property tax exemption of church property used for religious purposes any less a subsidy in the form of governmental services than would be cash grants to be used to pay for those services either directly or indirectly through the payment of tax bills? Proliferation of religious organizations with large property and financial interests presents problems for organized society that cannot be ignored.

What has just been said is not to suggest that the first amendment be revised or amended. There is room for the view that legitimate interpretation in relation to the dynamics of national experience can serve effectively both the individual and social values at stake.

The implementing sections of the post-Civil War amendments are the authority for legislation that has come to be the basis for effectuation of equal rights on a national scale. They are akin to the necessary and proper clause in granting broad legislative jurisdiction to effectuate the purposes of the amendments. Thus Congress can require, for example, nondiscrimination in public accommodations or submission of proposed annexation of territory in a municipality with a record of racial inequality in the electoral process for review by the Attorney General and a district court of the United States with respect to possible discrimination. Such legislation gives living force to the primary provisions found in the Constitution.<sup>99</sup>

The judicial experience with the first amendment guaranty of free speech and press has brought us, in relation to obscenity, to the *Miller* doctrine<sup>100</sup> that accords controlling force to "contemporary community standards."<sup>101</sup> In a very real sense, this accords different meanings to the Constitution from one community to another. Persons earnestly concerned with obscenity as a social problem might wish to modify the first amendment to allow wider scope for regulation, but the risk of getting something that is overdrawn at the expense of free expression would be great.

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98. See *Walz v. Tax Comm.*, 397 U.S. 664, 680 (1970) (Brennan, J., concurring).

99. See *Perkins v. Matthews*, 400 U.S. 379 (1971).

100. *Miller v. California*, 413 U.S. 15 (1973).

101. *Id.* at 24 (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)).

The wording of the grand jury provision of the fifth amendment stresses its character as a shield as contrasted with a sword.<sup>102</sup> Doubtless some lessening of secrecy, as by allowing an individual under scrutiny the right to presence of counsel and of cross-examination, would be consistent with the clause as it stands. But to allow the alternative of charging by information of the prosecuting officer would be a substantial change not of a shielding nature.

The action of the Supreme Court in upholding the use of even transactional immunity<sup>103</sup> as an enforced trade-off for the privilege against self-incrimination has not stirred approbation in all quarters. It is literally at odds with the unqualified language of the fifth amendment. There should be no support for any movement to conform the fifth amendment wording to the interpretive decision. Problems presented by organized crime are serious, but we are talking about a basic general principle.

Capital punishment is a controversial subject in our troubled society. There are those who would ban it outright, and there are others who would both insist upon capital punishment and at the same time outlaw nontherapeutic abortions by constitutional amendment, as well as eschew gun regulation. Historically it is plain enough that capital punishment is not per se a cruel and unusual punishment. If, however, the subject is to be reexamined at the constitutional level, why should not the most serious consideration be given to banning such a sanction? At this writing individuals are being executed in Iran in the most summary fashion. What kind of system of values leads people to act in that way, least of all in the name of religion? On what rational or moral basis can the state be freely eclectic in its respect for human life? The eighth amendment is, of course, subject to amendment, which might be to ban capital punishment.

## IX. THE TAXPAYER UPRISING

The tax limitation and budget balance fever that is endemic in the land is understandable but nevertheless troubling because it is generated by misconceptions concerning both objectives and methods. What sense does it make to impose severe restrictions, the consequences of which cannot be foreseen, and then try to adjust to them as unhappy

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102. In the celebrated case of *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 380 U.S. 935 (1965), as it turned out, the grand jury was the sword and the Attorney General the shield.

103. *Kastigar v. United States*, 406 U.S. 441 (1972).

results are experienced? What comes first is a well-considered identification of what society wishes to be done in the public sector. The second thing that has to be done is to make a soundly conceived distribution of responsibility and authority within the total governmental complex; the third is to provide the means required to get the job of government done. Such a comprehensive reexamination could be conducted by an official study commission—something far short of a constitutional convention. The undertaking would be well-nigh overwhelming, but there is need that it be done. These statements are almost embarrassingly simplistic, but their point so clearly should be borne in mind at this time that it must be made. It is long since time to take an overview. Political action could be reserved. Meanwhile, the placing of fixed limitations upon public revenue raising or spending, or both, forces choices on substantive matters that are likely to be quite arbitrary.

For a hundred years and more, the American states have undertaken to keep local units of government within fiscal bounds by constitutional limitations upon borrowing and taxing.<sup>104</sup> Yet during that period considerable ingenuity has been exercised in avoiding such limitations. Conspicuous examples in the area of local finance are resort to revenue bonds, payable from the revenues of revenue-producing facilities,<sup>105</sup> and to special districts and overlapping units.<sup>106</sup> The lesson this experience provides is that formal limitations do not serve very effectively in controlling response to felt need. Moreover, in terms of performing public functions well, devices like special districts not uncommonly are used in ways that do not relate governmental jurisdiction and performance rationally to the reach of human community and service needs.

This commentator has nothing good to say about the ponderous general property tax beyond recognizing that it is a very substantial revenue producer. Fortunately it has no place at the national level; a

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104. A limitation upon borrowing operates, in effect, as a limitation upon debt service taxation. An example of a rather special constitutional limitation is found in North Carolina. A local unit may incur debt in any fiscal year in excess of two-thirds of the amount by which its debt has been reduced during the next preceding year only if approved by a vote of the people of the unit. N.C. CONST. art. V, § 4. Texas is an example of a state that has express constitutional limitations upon both local borrowing and taxing. TEX. CONST. art. XI, §§ 4, 5.

105. See generally Fordham, *Revenue Bond Sanctions*, 42 COLUM. L. REV. 395 (1942).

106. The most conspicuous special districts are the well-nigh ubiquitous school districts. In addition to them are districts, small and large, for a wide range of purposes, the creation of many of which may be achieved under statutory authority as a matter of local decisionmaking without regard to how they will fit into the larger community context.

direct federal tax must be apportioned among the states according to population.<sup>107</sup> Moreover, the property tax is not a major factor at the state level. If it is to be retained on the local level, that should be done on a basis that permits rational decisionmaking in terms of meeting the costs of government and achieving something approaching a fair distribution of burden.

At this point we come back to the Proposition 13 syndrome. That constitutional amendment placed an aggregate limitation upon property taxes imposed by all California governmental entities upon any unit of taxable property of one per centum of assessed valuation, except for debt service levies or special assessments to pay principal and interest upon indebtedness approved by the voters prior to the time Proposition 13 took effect. Resort to other forms of local taxation is largely foreclosed by a section that authorizes a "special" local unit tax, except taxes on real property, only by a vote of two-thirds of the qualified electors of a unit. Presumably "qualified" means persons eligible to vote and not simply those voting. This is practically a prohibition.

State policy requiring that state and local governments operate within the fiscal limits of balanced budgets is commendably prudent. This is not to eschew some allowance for emergencies, nor is it to say that the policy be given constitutional status. Even though the states have the reserved powers of government in the federal system, the realities of the governmental scheme of things place the national government in the position to serve the commonwealth on a basis as wide as the national domain in a highly interdependent state of affairs. In this perspective, it is plain enough that there should not be rigid constitutional limitations upon the fiscal powers of the national government, which affect the well-being of the whole society. This is not to say that Congress on its own should not try to achieve a balanced budget.

Of course, it can be urged that exceptions might be made for critical needs like national defense. But there can be very pressing domestic concerns. A mild brake might be created by a constitutional requirement of an extraordinary vote in both houses of Congress—say, two-thirds of the total membership—to spend beyond the limits of the budget.

There are obvious differences between the national and state governments with respect to finance. The former has a panoply of fiscal powers, the exercise of which bears upon the social and economic well-

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107. 2 U.S. CONST. art. I, § 9, para. 4.

being of the whole society. Those powers comprehend taxation, spending for the general welfare, borrowing, providing a currency and, for public and private financial institutions, exaction of charges for services and for regulatory purposes. Policy involved in the exercise of those powers is not directed simply toward support of government and its operations. There is an essentially regulatory function that is inescapable. To tie Uncle Sam's fiscal hands behind his back to keep him from hurting himself (meaning all of us) would be self-defeating.

State legislators who clamor for a constitutional requirement of a balanced federal budget are not only exhibiting lack of faith in the very process to which their offices commit them but are inviting drastic reduction in federal aid to state and local governments, a source of funds that now runs to some eighty billion dollars per fiscal year. Certainly that would be a most likely area for budget-cutting. The real challenge is to do a better job within the existing scheme of things.

## X. CONCLUSION

While citizens of conservative outlook may be apprehensive about an open constitutional convention, the greater threat perceived in this quarter is to the cause of human rights and responsibilities. This is a period in which the spirit of reaction is strong in the land. Materialistic values occupy a high place in the public mind. Restrictions upon fiscal powers of government at all levels are objectives with much stronger public appeal than a constitutional amendment assuring equal rights to women. The genus is widely perceived not as trustee for all of nature but as self-serving exploiter of the total organic and inorganic scheme of things.

The establishment clause is under attack by those who would make the public school system a facilitator of sectarian religious practices. There are unceasing efforts to extend the already major contribution of organized society to religious institutions of one sort or another.

The case against the adoption of constitutional provisions imposing restrictions upon the fiscal powers of the national government is very compelling. Let us focus particularly upon a requirement that there be a balanced budget.

1. The fatal infirmity of such a limitation is that it is squarely at odds with the role of the national government in the life of the nation. Even if we took a simplistic view of the government as a unit raising and spending money in order to

do its job of performing public functions and providing public services, the pervasive interrelationships with the general economic and social well-being of the nation would have to be recognized. With a nod to the libertarians, in a nuclear age, with all the other risks and interdependencies that attend the human condition, it must be said there is no prospect of diminution of the roles of organized society. In a nation-state, both external and internal concerns have their demands.

2. It is inconceivable that a balanced budget requirement could rationally be made hard and fast. There must be recognition of military and other emergencies.

3. It is likely that a requirement of a balanced federal budget would operate to the severe disadvantage of the states and local units. Certainly general revenue sharing would be an obvious target. There are differences of opinion as to the wisdom of general revenue sharing. That may be left to independent examination, but the substantial financial considerations are not to be ignored here.

4. If state and local experience is to be heeded, federal fiscal limitations would stand as something to be avoided or circumvented by one or another ingenious device that would bring about outlay beyond the formal limits.

The question not to be evaded is whether we are serious about making representative government work.